IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.BALAKRISHNAN NAIR
&
THE HONOURABLE MR. JUSTICE HARUN-UL-RASHID

WEDNESDAY, THE 3RD OCTOBER 2007 / 11TH ASWINA 1929

CRP.No. 1372 of 2002(H)

RCA.195/2001 of RENT CONTROL APPELLATE AUTHORITY
(D.C. & SESSIONS COURT), ERNAKULAM
RCP.26/1998 of RENT CONTROL COURT (I ADDL.M.C.),ERNAKULAM
.....

REVN. PETITIONER: APPELLANT IN R.C.A.195/02- COUNTER PETITIONER IN RCP

K.T.THOMAS, S/O.K.M.THOMAS,
JOY BROTHERS PHOTO STUDIO,
STALIN JUNCTION, TRIPUNITHURA.

BY ADV. SRI.P.KESAVAN NAIR
SRI.K.G.CLEETUS
SRI.VINOY VARGHESE KALLUMOOTTILL

RESPONDENT: RESPONDENT IN R.C.A.195/01 & PETITIONER IN RCP.

P.SREEDHARA VARMA,
S/O.PONNAMMA NAMBIATHIRI,
VRINDAVAN, PRIYADARSHINI ROAD,
KANNANKULANGARA, TRIPUNITHURA. (DIED. ADDL. R2 TO R4
ARE IMPLEADED AS LEGAL REPRESENTATIVES OF THE DECEASED
RESPONDENT AS PER ORDER DATED 10.3.2005 IN IA 799/2005).

ADDL.R2. NANDAN VARMA, AGED 54, S/O. LATE P.SREEDHARA VARMA,
VRINDAVAN, PRIYADARSHINI ROAD,
KANNANKULANGARA, TRIPUNITHURA.

ADDL.R3. K. SURENDRA VARMA, AGED 52, S/O. LATE P.SREEDHARA VARMA,
NEELANJANAM, 50/762, KOSERI LANE, PONEKKARA,
EDAPPALLY NORTH VILLAGE.

ADDL.R4. PADMINI NAMBISHTATHIRI, AGED 78,
W/O. LATE P.SREEDHARA VARMA,
VRINDAVAN, PRIYADARSHINI ROAD,
KANNANKULANGARA, TRIPUNITHURA.

BY ADV. SRI V. SANKARA RAJA FOR ADDL. R2 TO R4.

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 14/09/2007 ALONG WITH CRP NO. 2431 OF 2002, THE COURT ON
03/10/2007 PASSED THE FOLLOWING:

K.BALAKRISHNAN NAIR & HARUN-UL-RASHID, JJ.

C.R.P.Nos.1372 & 2431 of 2002

Dated: October 3, 2007

ORDER

Harun-Ul-Rashid, J.

These two revision petitions are filed by the tenant against the common judgment dated 25.5.2002 passed in RCA Nos.195/2001 and 53/02 on the file of the Rent Control Appellate Authority, Ernakulam. Both the appeals arise from the jdgment dated 12.10.2001 in RCP 26/1998. The respondent is the landlod. The parties are hereafter referred to as the landlord and the tenant.

2. The Rent Control Court had directed the tenant to surrender vacant possession of the petition schedule building to the landlord under sec.11(8) of the Kerala Buildings (Lease and Rent Control) Act (hereafter referred to as the Act). The claim for eviction under sec.11(3) of the Act was not considered and was rejected. The landlord preferred RCA 53/2002 against the rejection of the claim for eviction under sec.11(3) and the tenant preferred RCA 195/2001 against the order of eviction under sec.11(8). The Appellate Authority by the impugned judgment allowed RCA 53/2002 filed by the landlord and set aside the findings of the Rent Control Court in so far as it rejects the claim for eviction under S.11(3). RCA 195/2001 filed by the tenant was dismissed upholding the order of eviction passed under S.11(8) of the Act. Thus the Appellate Authority, after confirming the order of eviction under S.11(8) of the Act, also held

that the landlord is entitled to an order of eviction under S.11(3) and the tenant is directed under S.11(3) to surrender vacant possession of the petition schedule building to the landlord. Aggrieved by the impugned order passed in the two rent control appeals, the tenant has come up in these two revision petitions challenging the findings of the Rent Control Appellate Authority.

3. The short facts leading to the passing of the orders by the authorities below are as follows:

The Rent Control Petition was filed by the landlord under S.11(2)(b), 11(3) and 11(8) of the Act. The landlord is the owner of the petition schedule building. The first floor of the said building was rented out to the tenant for conducting a photo studio twenty years back. The monthly rent at present is Rs.300/-. The landlord is conducting a shop dealing in electrical goods, which is a partnership concern, with his second son as a partner. This business is being conducted in one of the three rooms situated in the ground floor of the building, in which the petition schedule building is situated on the first floor. According to the landlord, the other two rooms situated adjacent to the room in which the landlord is conducting his business are very small, in the occupation of tenants for the last several years and are not suitable for his use. The landlord is doing wholesale business in electrical and allied items in addition to retail business. The need alleged by the landlord is that the space available in

the room wherein he is doing business is inadequate for storing electrical goods, for displaying the same and for retail sale of such goods. It is also averred in the petition for eviction that several salesmen and representatives of leading manufacturers of electrical goods frequently come to the shop for negotiating busines transactions, the space available is also inadequate for negotiations with the trade representatives and salesmen as well. In the said context the landlord further averred that he is put to great hardship for want of sufficient space. The petition schedule building has an area of 800 sq.ft. which will fully satisfy the need of the landlord and therefore he requires the tenanted premises for expansion of his business. It is also averred that he bona fide needs the aforesaid tenanted premises for his additional requirement. The landlord also pleaded that the tenant has another building in his possession which is very near to the petition schedule building wherein he is conducting another photo studio. It is also averred that the tenant has defaulted payment of rent for several months. Therefore the rent control petition for eviction was filed under sec. 11(2)(b), 11(3) and 11(8) of the Act.

4. The tenant resisted the claim for eviction contenting that the landlord had absolutely no genuine requirement or need, that the very claim is not bona fide and the intention of the landlord was to some how throw out the tenant from the petition schedule building and then let out the building inducting fresh tenants for better and higher consideration.

The tenant claimed protection of the second proviso to sec.11(3) and further pleaded that the test of comparitive hardship would also protect the tenant. It was also contented that the alleged need of the landlord who was not actually involved in the conduct of the business cannot be reckoned as "his own need" or "requirement for his personal use" as contemplated under sec. 11(3) and 11(8) of the Act.

5. The landlord on his side examined his son as PW.1 and another witness as PW.2 and Exts. A1 to A3 are marked. On the side of the tenant Rws.1 to 3 are examined and Exts. B1 to B8 are marked. The report submitted by the commissioner deputed by the court is also marked as Ext.C1.

6. The Rent Control Court on an appreciation of the evidence on record entered the finding that the claim is maintainable under sec. 11(8) and not under sec.11(3). Accordingly the rent control court did not proceed to consider the claim under sec. 11(3). The Rent Control Court came to the conclusion that the landlord has succeeded in establishing the claim for eviction under sec.11(8) and held that the genuine requirement for additional space for the use of the landlord has been established. The Rent Control Court also entered the finding that the payments made by the tenant till the date of the lawyer notice cleared the rent arrears and therefore there is no rent arrears as contemplated under sec. 11(2)(b) and found that the landlord is not entitled to get an order of eviction under sec.

11(2)(b) of the Act.

7. After referring to the pleadings in the Rent Control Petition the Rent Control Court held that the pleadings in the petition makes it clear that this is a case falling under sec.11(8) rather than under sec.11(3) and based on the said finding the Rent Control Court considered the fact whether the landlord is entitled to an order of eviction under S.11(8). The Rent Control Court examined the oral and documentary evidence including the commissioner's report and held that the landlord requires the petition schedule building for his additional accomodation for his personal use. The Rent Control Court also held on facts that the tenant is, in fact, conducting another studio by name 'Cene Photos', that he has other source of income and therefore rejected the tenant's contention that the income from the petition schedule building is his only source of income for his livelihood and that he has no other source of income. The Rent Control Court also, on an elaborate consideration, held that the tenant failed to prove that the hardship caused to him will far outweigh the advantage that will accrue to the landlord by an order of eviction.

8. The landlord is transacting business in electrical goods in partnership with his second son. The elder son of the landlord was examined as PW1. PW.1's evidence shows that he, along with his brother and father, is conducting business in partnership. It is not disputed that one room in the ground floor of the building is occupied by the landlord and

he is conducting business in electrical goods. There is no specific contention that the alledged need of the firm is not the personal need of the landlord or that the landlord is a dormant partner in the partnership. So practically there is no serious dispute on the question that the petitioner is a partner and the partnership is carrying on the business. Both the Rent Control Court and the Appelate Authority have gone through the oral evidence of Pws.1, 2, Rws.1 to 3 and Ext.C1 commission report and concluded that the alleged requirement/need of the landlord is bonafide and further held that clinching and satisfactory data is available that the partnership requires the petition schedule building as additional accomodation and that such requirement is matured into a need. The authorities also held that the requirement/need of the partnership are certainly to be reckoned as the requirement or need of the landlord. The courts also relied on the commissioner's report who reported that the landlord needs additional accommodation to conduct his business properly. The authorities below also answered all the contentions levelled against the bona fide requirement raised by the tenant. The contention that the landlord has disposed of other buildings prior to the filing of the petition was considered and both the authorities held on facts that there is nothig to indicate that the landlord had any other building in his possession either on the date of the petition or immediately earlier, which he could have made use of to satisfy the requirement/need on the basis of which

the present claim for eviction under S.11(3) or 11(8) of the Act is made. The further contention of the tenant that the real intention of the landlord is to dispose of the petition schedule building for rent or for attractive considertion was considered and held that there is absolutely no tangible data on which a conclusion can be reached that the landlord has no serious intention of making use of the petition schedule building in connection with the business in electrical goods which is being carried on in the ground floor.

9. The next question raised by the tenant is that sec.11(8) stipulates that the landlord may apply for eviction if he rquires additional accommodation for his personal use; therefore the requirement of partnership firm of which he is a partner cannot be reckoned as personal use so as to entitle him for an order of eviction under sec.11(8). After referring to the principles of law settled by binding judicial decisions, the court below held that S.11(8) can be invoked by a landlord if he is a partner of the business. On facts also the authorities below held that the landlord is an active partner concerned in the conduct of the business of partnership. The authorities below also found on facts that the tenant is running another establishment by name `Cene Photos' which is also situated very near to the petition schedule building and that the tenant has no active business being conducted presently in the petition schedule building. This finding is entered into after referring to Exts.B2 to B6 and

the oral evidence tendered by both parties.

10. The fact finding authorities also considered the evdience adduced by the tenant. It has come out in evidence that the tenant is conducting another studio by name `Cene Photos' and that the evidence of RW.1 will show that the tenant has other source of income. From the evidence of RW.1 the court came to the conclusion that the tenant is carrying on business in another building as stated above and that his source of income is the income from the business carried on therein. So, the fact finding authorities came to the conclusion that the contention that the income from the petition schedule building is his only income for his livelihood and that he has no other source of income does not appear to be correct. In such circumstances it was rightly held that the tenant has failed to prove that the hardship caused to him will far outweigh the advantage that will be gained by the landlord by the order of eviction.

11. S.11(3) applies when the building is wholly occupied by the tenant and the landlord bona fide needs the building for his own occupation or for the occupation of any memebr of his family dependant on him provided he does not have any building of his own in his possession in the same city, town or village whereas sub-sec.(8) applies when a landlord is already in occupation of a portion of the building and needs additional accommodation which the tenant is occupying, for his personal occupation.

12. In the instant case, admittedly the tenant is in occupation of a part of the building and the landlord is occupying another part of the building and the landlord requires additional accommodtion of the portion occupied by the tenant for his personal use. Therefore this case falls under sub-sec.(8) of S.11 and not under sub-sec.(3) of S.11 of the Act as rightly found by the Rent Control Court.

13. The distinction between sub-sec.(3) and sub-sec.(8) of S.11 of the Act is discussed and the application of the above said provisions are considered and decided in the decision reported in *Babu v. T.K.Vasudevan - 2001 (3) KLT 468 (SC).* A Division Bench of this court in *Pakran v. Kunhiraman Nambiar - 2004 (1) KLT 824* also had considered the claim of the landlord under S.11(3) and 11(8) and held that the standards to decide the bona fides of a claimant under S.11(3) and that of a requirement of additional accommodation under S.11(8) are different, the former being more vigorous than the latter.

14. The question whether S.11(3) and 11(8) are distinct and different and whether they are mutually exclusive came up for consideration again before a Division Bench in *Indian Saree House v. Radhalakshmi - 2006 (3) KLT 129.* The scope and ambit of the said sub-sections were discussed in detail and the Bench of this Court held that the distinction between S.11(3) and 11(8) would make it clear that they are mutually exclusive. The decision was arrived at following the same viiew

expressed in *2001(3) KLT 468 (SC) and in 2004(1) KLT 824* (supra).

15. This is a case where the landlord is occupying a part of the building and he requires another part of the building in the occupation of the tenant for his occupation so as to have additional accommodation and not to transplant himself from the portion he is occupying to the new portion occupied by the tenant. Therefore the case squarely falls under S.11(8) of the Act. If, on the other hand, a person is occupyig a portion of the building, another portion of the building is in the possession of the tenant and he wants that portion as he prefers to occupy that portion of the building and not the one he had been occupying, it will be a claim that falls under S.11(3). In that case, the portion, surrender of which is sought, is not required as additional accommodation, but as accommodation. To put it in brief, where what is sought to be recovered from the tenant is a portion of the building, another portion of which is occupied by the landlord, S.11 (8) would operate only when the portion occupied by the tenant is sought for the purpose of additional accommodation for the landlord. On the facts of the case there cannot be an application both under S.11(3) and 11(8) and therefore the application will have to be considered as an application under S.11(8) of the Act.

16. The Rent Control Court did not consider the ground of eviction under S.11(3) since it found that the case at hand is one falling under S.11(8) and not under S.11(3). The Rent Control Appellate Authority

relying on certain decisions held that S.11(3) is also attracted and therefore proceeded to consider the case of the landlord under S.11(3) and 11(8) and held that S.11(3) and 11(8) are not mutually exclusive. The Appellate Authority allowed the grant of eviction under S.11(3) and further held that no serious arguments were advanced before it to claim the protection under the second proviso to S.11(3) of the Act. The Appellate Authority also on evidence found that there is no satisfactory evidence to examine either of the two ingredients under the second proviso to S.11(3) of the Act in this case.

17. In view of the principles of law laid down in the above said decisions, we are not inclined to accept the view taken by the Rent Control Appellate Authority that S.11(3) applies to the present case.

18. In the result, we hold that S.11(3) has no application in this case. We confirm the concurrent findings of fact entered by the authorities below that the landlord has established a case for eviction under S.11(8) of the Act. We allow CRP 2431/2002 and set aside the finding of the Rent Control Appellate Authority on the ground of eviction under S.11(3). We confirm the decision of the Rent Control Appellate Authority on the finding of eviction ordered under S.11(8) of the Act. Accordingly, we dismiss CRP 1372/2002.

The learned counsel for the tenant requested for six months' time for vacating the premises. Time is granted on condition that the revision

petitioner/tenant shall file an undertaking in the form of an affidavit before the Execution Court unconditionally undertaking to vacate the premises within six months from today and on condition that the tenant shall pay the rent till the date of vacating the premises regularly and shall pay the arrears of rent, if any, within one month from today. The affidavit shall be filed within three weeks from today. There will be no order as to costs.

K.BALAKRISHNAN NAIR
JUDGE

HARUN-UL-RASHID
JUDGE.

mt/-

K.BALAKRISHNAN NAIR &
HARUN-UL-RASHID, JJ.

CRP Nos.1372 & 2431 of 2002

ORDER

3.10.2007